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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL GRANADOS, Defendant and Appellant.	B201277 (Los Angeles County Super. Ct. No. PA058856)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles L. Peven, Judge. Affirmed.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Miguel Angel Granados appeals from the judgment entered following a jury trial that resulted in his convictions for possession of cocaine base for sale and offering to sell, furnish, or give away a controlled substance. Granados was sentenced to a prison term of four years.

Granados contends an expert improperly opined that he was guilty, and his trial counsel rendered ineffective assistance by failing to object to the testimony. Discerning no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's case.*

On September 19, 2006, at approximately 12:30 p.m., Los Angeles Police Department Detective Supervisor Theresa Coyle and Officer Charles Chacon were patrolling near Columbus Avenue and Parthenia Place in the San Fernando Valley, an area known for "blatant" narcotics sales. The officers were wearing plainclothes and were driving an unmarked vehicle.

The officers observed Pete Guerra loitering in an open park area. Chacon recognized Guerra as a possible warrant suspect. Additionally, Guerra was speaking to passersby as if attempting to purchase drugs. To get a better vantage point, the officers drove through an alley toward Guerra's location. When they emerged from the alley, they saw Guerra and appellant Granados walking together, engaged in conversation. Guerra had his right hand extended in front of him and was holding currency. Granados had his right hand by his side, clenched in a fist. As the officers observed, Granados opened his fist as if showing Guerra something, and both men looked down at Granados's open hand. Granados appeared nervous. Based on the men's behavior, the officers believed a narcotics transaction was taking place.

When the officers pulled to the curb, Granados and Guerra spoke to each other and began walking in different directions. The officers exited their vehicle and identified themselves. Granados turned toward Coyle and threw something to the ground. Coyle then observed several small pieces of what appeared to be rock cocaine near Granados's

feet. Granados was arrested. A sticky, pasty, residue resembling cocaine was on his right hand. He was carrying $97 in United States currency, but did not have any drug paraphernalia in his possession.

After being advised of his *Miranda* rights,[1] Granados admitted to Officer Chacon that the cocaine found on the ground was his. Granados explained that Guerra had asked to purchase a "dime," i.e., a small amount of cocaine base worth ten dollars. Granados removed a "rock" of cocaine from his pocket and asked Guerra for a pipe. He stated he was "going to give [Guerra] a piece for $10." Chacon asked Granados if he sold drugs. Granados replied, "[S]ometimes I do, but I mostly use cocaine. I have a terrible drug problem."

Guerra was also stopped and searched. His backpack contained a pipe typically used to smoke rock cocaine, with an off-white residue resembling cocaine base, as well as approximately $11.

During booking, Granados told Chacon that he often sold drugs in the area of Parthenia and Columbus. He stated he was "really good," and was able to avoid arrest, because he hid the drugs in a variety of places such as in the grass, in cracks, and the trash.

The substance Granados dropped on the ground was tested and determined to consist of 0.05 grams of a substance containing cocaine base. In Detective Coyle's opinion, the amount recovered was a useable amount of cocaine.

b. *Defense case.*

Granados testified in his own behalf, as follows. He had just purchased rock cocaine when Guerra approached and asked if Granados would sell drugs to him. Granados replied that the drugs he had were for his own use and he did not know where Guerra could obtain more. Granados asked if Guerra would lend him a pipe, and in exchange he would "give him something." However, he threw the cocaine when he

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

realized Coyle and Chacon were police officers. He did not tell Chacon that he sold cocaine or that he had agreed to sell cocaine to Guerra.

Granados admitted suffering a prior felony theft conviction and giving a false name to police.

2. *Procedure.*

Trial was by jury. Granados was convicted of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and offering to sell, furnish, or give away a controlled substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)). The trial court sentenced Granados to a term of four years in prison.[2] It also imposed a restitution fine, a suspended parole restitution fine, a court security assessment, a laboratory analysis fee, and penalty assessments.

DISCUSSION

Admission of Detective Coyle's testimony was not prejudicial error; defense counsel did not provide ineffective assistance.

a. *Additional facts.*

Without objection, the prosecutor asked Detective Coyle, based on her experience and the evidence in the case, "what factors indicate that a sale was about to take place here?" Coyle replied that based on the narcotics sales typically occurring in the area, Guerra's and Granados's behavior, the amounts of cash found in their possession, the discarded cocaine, and the fact Guerra had a pipe and Granados did not, she believed "there was a narcotic transaction was going to take place." She explained, "I believe we intercepted a little bit too early, which is the chance we take when we move up on the individuals. Sometimes it is because we want to secure the evidence that we see before us and sometimes it's just bad timing. But I believe that if we had waited another ten seconds or so that transaction would have been complete. That's basically what led to

[2] The trial court also imposed an eight-month sentence, with credit for eight months served, in two cases in which Granados was found to be in violation of probation.

[my] belief[3] that he was selling narcotics, selling rock cocaine, and Mr. Guerra was purchasing it." The prosecutor then asked, without objection, whether in Coyle's opinion Granados intended to sell rock cocaine to Guerra. Coyle responded affirmatively.

b. *Discussion.*

Granados complains that Coyle's expert opinion was inadmissible because she "impermissibly addressed a question of law, usurped the jury's function as the trier of fact, and directly addressed the issue of whether appellant was guilty" of the charged crimes. We disagree.

First, because no objection was made on this ground below, Granados has forfeited this claim on appeal. (Evid. Code, § 353, subd. (a); *People v. Lindberg* (2008) 45 Cal.4th 1, 47-48; *People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1734-1735.)

Granados, however, contends his counsel was ineffective for failing to object. A meritorious claim of constitutionally ineffective assistance must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. If the defendant makes an insufficient showing on either component, the ineffective assistance claim fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

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3 Coyle initially stated, "That's basically what led to *our* belief that he was selling narcotics . . . ." (Italics added.) Defense counsel stated, "I'll object to our belief," and Coyle corrected her statement to clarify that she was referring only to her own belief.

Granados cannot establish either prong of his ineffective assistance claim. First, the bulk of Coyle's expert testimony was clearly not objectionable. A witness is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education on the subject to which his or her testimony relates. (Evid. Code, § 720; *People v. Fudge* (1994) 7 Cal.4th 1075, 1120.) Coyle testified regarding her training and experience related to narcotics crimes. She had worked as an officer for over 17 years, had completed narcotics training, and had arrested hundreds of persons for narcotics offenses. Granados appropriately does not challenge her qualifications as an expert.

The subject matter of Coyle's testimony was proper. An expert may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (Evid. Code, § 801, subd. (a); *People v. Watson* (2008) 43 Cal.4th 652, 692; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651.) An expert may render opinion testimony on the basis of facts given in a hypothetical question, as long as the question is rooted in facts shown by the evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 209; *People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Boyette* (2002) 29 Cal.4th 381, 449.) Granados correctly acknowledges that Coyle properly testified regarding the level of drug trafficking in the area and "such matters [as] hand-to-hand drug transaction[s]." These matters are beyond the ken of the average juror, and expert testimony on these topics assists the trier of fact. "[A]lthough ordinarily courts should not admit expert opinion testimony on topics so common that persons of ' "ordinary education could reach a conclusion as intelligently as the witness" ' [citation], experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony." (*People v. Prince* (2007) 40 Cal.4th 1179, 1222; see also *People v. Fudge, supra,* 7 Cal.4th at p. 1121.)

Further, it is settled that an expert may opine as to whether the defendant possessed narcotics for the purposes of sale. (See *People v. Newman* (1971) 5 Cal.3d 48, 53, disapproved on another point in *People v. Daniels* (1975) 14 Cal.3d 857, 862; *People v. Harris* (2000) 83 Cal.App.4th 371, 374-375; *People v. Carter* (1997) 55 Cal.App.4th

1376, 1378.) Granados attempts to challenge this principle, complaining that the cases cited by the People, i.e., *Newman*, *Harris*, and *Carter*, are of limited use. He argues that *Newman* and *Harris* addressed the sufficiency of the evidence, rather than a challenge to expert testimony, and none of the three cases recited the specifics of the expert testimony elicited therein, leaving open the possibility that the experts in those cases testified in the form of hypotheticals. We are unpersuaded. In considering the sufficiency of the evidence, *Newman* expressly stated, "In cases involving possession of marijuana or heroin, experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld." (*Newman, supra,* at p. 53.) Application of this rule was integral to the court's conclusion the evidence was sufficient. We are not at liberty to disregard the pronouncements of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In *Carter*, the trial court allowed a police officer "to render an expert opinion *that defendant possessed rock cocaine for purposes of sale*, based on the quantity of the drug possessed . . . ." (*People v. Carter, supra,* at p. 1377, italics added.) On appeal, the court concluded such testimony was proper. (*Id.* at p. 1378.) Although the challenged testimony was not set forth verbatim in *Carter*, the case clearly stands for the proposition that an expert may properly render an opinion that the defendant possessed drugs for sale.

Of course, neither an expert nor a lay witness may opine about a defendant's guilt or whether a crime has been committed. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 77; *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.) The main thrust of Granados's argument appears to be that, because Coyle's testimony regarding her belief that a sale was about to occur was not given in response to a hypothetical question, it was tantamount to an opinion that Granados was guilty. The People, on the other hand, correctly point out that an expert's testimony is not objectionable merely because it embraces the ultimate issues to be decided by the trier of fact. (Evid. Code, § 805;

People v. Prince, supra, 40 Cal.4th at p. 1227; *People v. Coffman and Marlow, supra,* at p. 77 [opinion testimony often goes to the ultimate issue in the case]; *People v. Killebrew, supra,* 103 Cal.App.4th at p. 651; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507.) The People posit that Coyle's opinion that Granados was in the middle of a drug sale, while encompassing an ultimate issue in the case, was not an opinion on guilt.

Experts may, in a proper case, testify that a defendant's behavior is consistent with criminal activity. (See *People v. Prince, supra,* 40 Cal.4th at pp. 1223-1224, and cases cited therein.) In *People v. DeWitt* (1983) 142 Cal.App.3d 146, for example, a police detective testifying as an expert at a preliminary hearing opined regarding "the probable intention of hypothetical individuals conducting themselves in the manner of" the defendants. (*Id.* at p. 149.) The detective opined that "it was reasonable to conclude that two felons, one wearing a disguise and each possessing a loaded handgun, found skulking about an affluent residence while in possession of handcuffs and a change of clothing might well have agreed to and embarked upon the commission of a robbery." (*Ibid.*) The appellate court concluded that the testimony was proper and was "clearly quite helpful to the magistrate." (*Id.* at p. 151; see also *People v. Gardeley, supra,* 14 Cal.4th at pp. 619-620 [expert properly opined on whether certain behavior constituted gang-related activity]; *People v. Clay* (1964) 227 Cal.App.2d 87, 92-95 [expert testified that conduct such as that engaged in by the defendant constituted the " 'usual procedure' " followed in committing the crime of till tapping].) In short, it is permissible for an expert, in a proper case, to testify to a conclusion about whether criminal activity was occurring based upon the expert's observations of the defendant. Such was the case here. Coyle's testimony regarding Granados's intent, based on her knowledge of the usual modus operandi of drug transactions, was not improper.

Granados is correct that Coyle's testimony was not given in response to a hypothetical question. Any error, however, was inconsequential. Unchallenged evidence established that the incident occurred in an area known for narcotics sales. In fact, Coyle explained that narcotics sales were so common in the area that one could "drive down the street and conduct narcotics transactions hand to hand with any individual standing on the

sidewalk who flags you over." Guerra displayed money and Granados displayed cocaine while the men were walking together. The men parted company when police arrived, and Granados threw his cocaine on the ground. Guerra possessed a pipe and enough cash to purchase a "dime" of cocaine, whereas Granados possessed approximately $97 – an amount consistent with small-scale sales – but no drug paraphernalia. The question asked of Coyle – whether these circumstances indicated a drug sale was in progress – could clearly have been asked in the form of a nonobjectionable hypothetical question. Coyle's response to such a hypothetical question would have placed essentially the same information before jurors as did the answers Granados challenges as improper. Under these circumstances, counsel could have made a reasonable tactical decision that an objection would have been fruitless. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance; there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance]; *People v. Bolin*, *supra*, 18 Cal.4th at pp. 321-322; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091 [defense counsel is not required to make futile motions or to indulge in idle acts to appear competent].)

Further, given the strong evidence that a cocaine sale was intended and impending, we cannot conceive that the result would have been more favorable to Granados had Coyle's testimony been given in response to a hypothetical question. In addition to the circumstances discussed *ante*, Officer Chacon testified that Granados had admitted he was going to give Guerra a piece of cocaine for $10, and admitted he often sold drugs in the area. On this record, Granados has failed to establish prejudice. (See *People v. Holt* (1997) 15 Cal.4th 619, 703 [to establish the second prong of an ineffective assistance claim, the defendant must show a reasonable probability that absent counsel's errors, a result more favorable to him would have resulted]; Evid. Code, § 353, subd. (b); *People v. Avitia* (2005) 127 Cal.App.4th 185, 194 [the erroneous admission of evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded].)

Granados argues that prejudice is demonstrated by a note jurors sent to the court during deliberations. That note queried, "The definition for 'intended to sell it;' [¶] Count 1 – possession for sale of cocaine base. [¶] Point 4 – is there a time limit for intent or any other definition you can give us." These questions, while demonstrating the jury seriously considered the issue of intent, do not demonstrate prejudicial error. The jury's questions did not reference Coyle's expert opinion. Nothing suggests the jury relied improperly upon the relatively minor aspects of Coyle's testimony that Granados challenges as improper. As we have explained, the fact Coyle's testimony was not given in response to a hypothetical question cannot have made a significant difference to the jury's interpretation of the evidence.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.